United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7140

RALPH METZGER, JR., ADELE METZGER, and RALPH METZGER, III, an infant under 14 by his parent, Ralph Metzger, Jr.,

Plaintiffs-Appellants,

-against-

THE ITALIAN LINE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANTS

FILED
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ISSUES PRESENTED

1. Did the District Court err in failing to find under Rule 56 (c) F.R.C.P. that there exist genuine issues as to material facts concerning the negligence of the ship's officers, employees and agents including the ship's on-board Cruise Director and the ship's Shoreside Agent whose acts and omissions were concurrent proximate causes of the injuries sustained by the plaintiffs-appellants?

2. Did the District Court err in failing to find under Rule 56 (c) F.R.C.P. genuine issues as to the material facts concerning the duties, responsibilities, customs and practices of the defendant's on-board Cruise Director and the defendant Vessel-Owner with respect to cruise passengers in the absence of testimony and in the absence of any affidavits controverting the plaintiffs-passengers' affidavits on these genuine issues as to material facts?

3. Did the District Court err in deciding that the defendant had "no awareness of a risk" and "consequently no duty to warn" in the absence of any proof in the moving affidavits to support this ruling and in the face of opposing affidavits of the plaintiffs-passengers stating facts on personal knowledge concerning the awareness of risk and the duty to warn?

4. Did the District Court err in failing to find

genuine issues of material fact concerning the failure of the Vessel-Owner defendant to render adequate, prompt, proper medical care and attention to the plaintiffs-passengers?

5. Did the District Court err in applying as a matter of law the limited liability rule of Amdur v. Zim Israel Navigation Company 310 F. Supp. 1033 (S.D.N.Y. 1969) that a vessel owner is liable only for negligent selection of a physician instead of applying the doctrine of respondeat superior set forth in Nietes v. American President Lines, Ltd. 188 F. Supp. 219 (DC Cal. 1959)?

6. Did the District Court err in making a factual determination that the ship's doctor was competent and that the Ship-Owner was not negligent in hiring him and that reasonable care and diligence have been exercised in the hiring and that the doctor's fitness had been diligently inquired into and proper evidence of his qualifications had been received by the Ship-Owner, when none of these facts appeared in the supporting affidavits of the Ship-Owner's motion for Summary Judgment presented to the District Court?

Note: Pages 3 & 4 are reversed in error.

by the attorney for the defendant and neither of which was based on personal knowledge. (75a-96a)

No affidavits or testimony of the Master, Cruise Director or any crew member with personal knowledge were submitted.

U.S. District Judge Richard Owen, after oral argument, granted Summary Judgment by Opinion and Order dismissing the action. (39a-43a)

Thereafter, the Clerk of the District Court entered Judgment dismissing the action. (44a)

Plaintiffs appeal from both the Order and Judgment.

Facts Relevant to Issues Presented for Review:

On December 30, 1969, the plaintiffs, who were cruise passengers aboard the cruise ship SS Leonardo Da Vinci, owned and operated by the defendant, arrived at the port of Montego Bay, Jamaica, West Indies, during the course of the cruise. The cruise had commenced at New York on December 20, 1969. They had visited various cruise ports and it was intended that the cruise would return with the plaintiffs as cruise passengers, to the Port of New York on January 2, 1970. As part of the cruise activities, cruise passengers, including the plaintiffs, went ashore at the various ports for the purpose of enjoying and visiting the various ports. The vessel employed, as part of its crew, a special staff known as the Cruise Staff, headed by a Cruise

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

Nature of Case:

Ralph Metzger, Jr., his wife Adele Metzger and their son Ralph Metzger, III brought this action in the District Court to recover damages for personal injuries sustained by all of them while they were passengers on a steamship, the SS Leonardo Da Vinci, which was owned, operated and controlled by the defendant The Italian Line.

Proceedings Below:

After the commencement of the action by the plaintiffs, the defendant answered, served interrogatories and notice of examinations before trial of plaintiffs. The plaintiffs served answers to interrogatories and were all examined before trial by the defendant. (3a-38a), (114a-217a)

The defendant moved for Summary Judgment based upon affidavits of personal knowledge of the ship's doctor and two shoreside doctors and an opinion affidavit of a doctor not connected with the defendant and an affidavit of defendant's attorney and an affidavit of a Jamaica lawyer relating to Jamaica law. (47a-74a)

Plaintiffs opposed the motion by affidavits of personal knowledge by Ralph Metzger, Jr., and Adele Metzger and by affidavit of the attorney for the plaintiffs. Defendant replied to the plaintiffs' opposing affidavits by submitting a reply affidavit and a supplemental reply affidavit, both

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1. Numbers followed by "a" refer to pages in the appendix.

Director for the specific purpose of furthering the mutual benefits to be derived by both the cruise passengers and the vessel owner and the ports at which the vessel stopped.

In addition to the cruise staff, the vessel employed a full medical staff on board and had an outfitted hospital area consisting of almost one-half of the Upper Deck. In addition, on this particular cruise, there were numerous physicians as cruise passengers which is not uncommon at this season of the year.

The plaintiffs had embarked on the SS Leonardo Da Vinci for a West Indies Festival Cruise on December 20, 1969 at the Port of New York for a pleasure cruise to the indicated Ports of San Juan, Puerto Rico, St. Thomas, Curacao, Cristobal and Montego Bay (Jamaica, West Indies) and scheduled to return to New York on January 2, 1970.

At the Port of Montego Bay, the defendant has as its ship's agent a firm called Fletcher & Co., Ltd. conducted by Mr. Fletcher.

Fletcher & Co., Ltd.owned, operated, managed and controlled a docking wharf or area known as Fletcher's Wharf, to which the tenders of The Italian Line tied up when they brought passengers, including the plaintiffs, from the SS Leonardo Da Vinci which was in the harbor, to the Wharf.

Prior to the plaintiffs going ashore at Montego Bay, the Cruise Director, Mr. Jack Scordley, had in accord-

ance with the usual custom and practice of Cruise Directors, given information to the cruise passengers concerning the Port of Montego Bay, but at no time did he warn them or advise them concerning the differences between the type of taxis and taxi drivers, namely licensed and unlicensed, who were at the ship's dock and who would offer their services to the cruise passengers.

On the basis of the plaintiffs' investigation subsequent to the accident, the taxi was apparently an unlicensed taxi.

When the plaintiffs went ashore as cruise passengers at Montego Bay, they hired a taxi which started for the resort area of Ocho Rios. This ride takes approximately one and one-half hours. However, about one-half hour from Montego Bay at a point near a town called Duncans, the taxi became involved in a four vehicle accident as a result of which the plaintiffs sustained personal injuries.

The accident occurred on December 30, 1969, which was both arrival and sailing day at Montego Bay, Jamaica (75a). Plaintiffs were taken to Falmouth Dispensary and then were delivered to a hospital in Montego Bay after refusal by the ship's doctor to take the plaintiffs aboard the vessel to New York. Plaintiffs arrived in New York by air on January 5, 1970 (145a).

POINT I

THE DEFENDANT SHIP-OWNER BREACHED ITS DUTY TO THE PLAINTIFFS-PASSENGERS AND SAID BREACH OF DUTY WAS THE CONCURRENT PROXIMATE CAUSE OF PLAINTIFFS' PERSONAL INJURIES AND CONSEQUENT DAMAGES

A Ship-Owner owes to its fare-paying passengers a high duty of care to provide for their safety. Moore v. American Scantic Line 121, F. 2d 767.

See also The Arabic 50 F. 2d 96 (2 Cir.)

It is the contention of the plaintiffs that the defendant was negligent in two basic areas concerning which the material facts are in genuine dispute. The first area is that of the duty of the Cruise Director to warn of known dangers ashore. From the affidavit of Ralph Metzger, Jr. (90a-96a) and the plaintiffs' answers to interrogatories (27a), the plaintiffs put in issue the extent of the knowledge of the Cruise Director of the conditions at the various ports to which the cruise ship went and at which the cruise ship passengers stopped and the extent to which, having undertaken to advise the cruise passengers of the good and bad ashore in the various ports, the said Cruise Director was obligated to warn all of the passengers, including the plaintiffs, of the taxi conditions ashore at Montego Bay which they would encounter at the wharf to which the ship's tender brought them. The wharf was opera-

ted by the ship's Shoreside Agent.

In the case of Glanzer v. Shepard 233 N.Y. 236 (N.Y. Court of Appeals 1922) - the famous bean weighing case - Judge Cardozo, after a very thorough erudite and authoritative review of the law stated, among other things,at page 239: "it is Ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully if he acts at all." The act of the Ship-Owner in having on board a Cruise Director and staff, cannot be classified as a gratuitous act, but was part of the services rendered to the cruise passengers for the mutual benefit of the cruise passengers and the Vessel-Owner. Even assuming however, that the act of announcing the good and the bad was a gratuitous act on the part of the Cruise Director, (94a), nevertheless, under Glanzer v. Shepard, the Vessel-Owner breached its duty to the passengers. It was this breach of duty, this failure to warn that was a concurrent proximate cause of the injuries sustained by the plaintiffs.

The omission on the part of the ship's Shoreside Agent to warn of the known dangers to be encountered through the use of unlicensed taxis and taxi drivers, was likewise a breach of the Ship-Owner's duty to the cruise

passengers and was therefore a concurrent and proximate cause of the injuries sustained by the plaintiffs. See Glanzer v. Shepard cited supra page 241, 242.

The second area in which plaintiffs claim the defendant was negligent was the breach of the duty of the ship to render adequate, prompt and proper medical care and attention. The affidavits in support of the motion submitted by the attorney for the defendant may be disregarded for the reason that they do not qualify under Rule 56 (e) since they are not made on personal knowledge. The same applies to the affidavit of Dr. Howard Balensweig. With respect to the affidavits of Dr. Nobis, Dr. Berry and Dr. Hastings, the statements made therein on the factual issues (57a-63a) are disputed by the affidavits of the plaintiffs made on personal knowledge (75a-96a). There is no affidavit in support of the motion or testimony by deposition in support of the motion which even remotely is related to the issues of fact required by a decision under the Amdur v. Zim Israel Navigation Company 310 Supp. 1033 (at page 1042) doctrine that the Ship-Owner is not as a general rule liable for the negligence of the ship's doctor provided the duty of selecting a physician who is competent and duly qualified has been fulfilled.

Even in Branch v. Compagnie Generale Transatlantique 11 F. Supp. 832 (S.D.N.Y. 1935) cited by the District

Court below as authority for its decision, Judge Hulbert said "it seems to be well settled that a Ship-Owner does his whole duty if he employs a duly qualified and competent surgeon and medical practitioner and supplies him with all necessary and proper instruments, medicines and medical comforts and has him in readiness for such passengers as choose to employ him." Even the factual test laid down by Judge Hulbert was not met by the moving party in the case at bar. However, it is the position of the plaintiffs that the Nietes case cited below, expresses the more modern view and that the material issues of fact which are in dispute should be brought out at a jury trial at which time the application of the Nietes case will reach its true significance.

Certainly no facts were submitted on behalf of the moving party concerning the Ship-Owner's responsibility for the ship's doctor as set forth in Nietes v. American President Lines, Ltd. 188 F. Supp. 219 (N.D. Cal. 1959. Judge Levet of the Southern District in Amdur concedes that while he disagrees with the rationale of Nietes, nevertheless, Nietes may be viable for the specific fact pattern. Thus it will be seen that the District Court in the case at bar has committed error in misapplying the standards intended for the application of Rule 56.

POINT II

A DISTRICT COURT MAY NOT GRANT A MOTION FOR SUMMARY JUDGMENT UNLESS THE MOVANT HAS CARRIED THE BURDEN OF CLEARLY SHOWING THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW

In order for a Court to grant Summary Judgment it must be clearly shown that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The pertinent portion of Rule 56 (c) F.R.C.P. is as follows:

> (c) MOTION AND PROCEEDINGS THEREON.....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

This Court in Friedman v. Meyers 482 F. 2d 435, (1973 2nd Cir.) at page 438 stated that the defendant by moving for Summary Judgment, assumed the burden of establishing that there was no genuine issue with respect to those material facts that would entitle them to dismissal of the complaint. Citing Adickes v. S.H. Kress & Co. 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L Ed. 2d 142 (1970); Cali v. Eastern Air Lines, Inc. 442 F 2d 65, 71 (2d Cir. 1971). See also Alpert v. Zim. Lines 370 F. 2d 115 (2d Cir. 1966).

Accord: Jacobson v. Maryland Casualty Company 336 F. 2d 72, 74 (8th Cir.); Janek v. Celebreeze 336 F. 2d 828, 834 (3rd Cir.)

The defendant has clearly failed to meet the burden of establishing that no genuine issue of material fact remains in the case since the affidavits of the plaintiff passengers Ralph Metzger, Jr. and Adele Metzger raise the issues as to the knowledge of the Cruise Director and the Ship's Agent and the Master of the ship with respect to the taxis and drivers who are made available to the cruise passengers by the very existence of the cruise ship arrivals and departures from the Port of Montego Bay (82a), (94a), (95a). There is no affidavit submitted by the defendant by any person with knowledge of the cruise and the Cruise Director's functions and duties and custom and practices, nor is there any affidavit by the Master or the Ship's Agent which explains or controverts the issues raised by the plaintiff passengers. Rule 56 (e) F.R.C.P. sets forth the documents which must be submitted in support of a motion for Summary Judgment as follows:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

An affidavit by an attorney who obviously has no personal knowledge and is not competent to testify has no

probative value on a motion for summary judgment. See Mercantile Nat. Bank at Dallas v. Franklin Life Ins. Co., 248 F. 2d 57 and authorities collected therein.

The plaintiffs have set forth in their affidavits referred to above, genuine issues as to material facts as to the knowledge of the parties, the state of mind of the parties and the intent of the parties and the Court below determined an issue offact which the Court calls "awareness of a risk" in favor of the defendant. The Court below did this despite repeated statements by this Court that Summary Judgment is particularly inappropriate in cases where it is sought on the basis of inferences which the parties seek to have drawn as to questions of motive, intent, subjective feelings and reactions. In Friedman v. Meyers cited supra at page 439 this Court said:

> "The other claims and defenses in the present suit bristle with genuine issues as to the material facts. For instance, issues are raised as to the state of mind, intent and knowledge of the parties. We have repeatedly stated that summary judgment is particularly inappropriate where, as here, it is sought on the basis of 'the inferences which the parties seek to have drawn [as to] questions of motive, intent, and subjective feelings and reactions;' Cali v. Eastern Airlines, Inc., supra at 71, quoting Empire Electronics Co. v. United States 311 F. 2d 175, 180 (2d Cir. 1962). See Union Insurance Society of Canton, Ltd. v. William Gluckin & Co., 353 F.2d 946, 951 (2d Cir. 1965); Cross v. United States, 336 F.2d 431, 433 (2d Cir. 1964)."

The lower Court cited as its sole authority on the

claim of the plaintiffs concerning the ship's negligence as to the Cruise Director and the Ship's Agent, a case which is clearly distinguishable from the case at bar. In the cited case (Feig v. American Airlines, Inc. 167 F. Supp. 843) (DDC 1958) the passenger carrier relationship had been terminated with the carriage of the passengers to Mexico City. In the case at bar, the cruise from New York to the Caribbean and return was still continuing. Secondly, there was a specific tour contract which expressly released the carrier in the Feig case. In the case at bar, there is no such express tour contract nor is there any express release.

The Court below again decided disputed issues of fact instead of determining that issues of fact existed. The affidavit of Dr. Nobis was controverted as to material issues of fact by the affidavit of personal knowledge of both the plaintiff passengers, Ralph Metzger, Jr. and Adele Metzger (75a-89a), (90a-96a). The reliance of the Court below on the Amdur v. Zim Israel Navigation Company case (310 F. Supp. 1033((S.D.N.Y. 1969) is misplaced and inapposite, since Judge Levet at page 1042 clearly sets forth that there are mixed questions of law and fact to be determined before the decision can be made concerning the shipowner's responsibility for the negligence of the employed ship's doctor. Judge Levet at page 1042 cites the case of Nietes v. Ameri-

can President Lines, Ltd. 188 F. Supp. 219 (DC Cal. 1959) in which Judge Sweigert decided that a shipping company would be held vicariously liable for the negligence of a ship's physician. Judge Levet's view was that the Nietes case should be strictly applied and he used this language at page 1042: "this rationale, while perhaps viable for the specific fact pattern in Nietes, is not sound as a general rule." Whether the facts in the case at bar would come under the exceptions referred to by Judge Levet in the Amdur case is an issue of fact. The Court below erred in determining this case against the plaintiffs by granting the motion for Summary Judgment and thereby foreclosing a trial on the facts.

The moving papers were insufficient upon which to base a motion for Summary Judgment. The defendant had not met its burden of proving that there were no genuine issues of material facts remaining to be tried before a jury.

POINT III

ON A MOTION FOR SUMMARY JUDGMENT THE COURT CANNOT DECIDE ISSUES OF FACT BUT CAN ONLY DETERMINE WHETHER THEY EXIST

The defendant ship owner brings this motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure. The authorities are clear that on this motion the Court can only determine whether issues of fact exist, or put another way, whether there are genuine issues in dispute as to material facts. See Nakhleh v. Chemical Construction Corp. (1973 DC-N.Y.) 359 F. Supp. 357. See Also Buren v. Schein (DC-N.Y.) 32 Fed. R Dec. 218; Friedman v. Meyers 482 F.2d 435 (1973 - 2 Cir.); Duzzelli v. Minnesotta Mining & Mfg. 480 F. 2d 541 (1973 - 6 Cir.).

The Second Circuit has repeatedly stated that summary judgment is an extraordinary remedy and must only be granted in the event that there is a complete absence of any reasonable doubt as to any material fact being in issue. In Willetts v. General Telephone Directory Co. (DC-N.Y.) 38 Fed. R Dec. 406, the Court ruled that issues of negligence are ordinarily not susceptible of summary adjudication. Such remedy may be invoked only when a complete absence of genuine fact issues appears on the face of the record. All doubts on this point must be resolved against the moving party.

The Court below not only has decided issues of fact which it should not have done, but also in its opinion, con-

cedes that there are disputed issues of fact concerning the negligence of the ship's doctor since the last part of the Court's Opinion states that "even if under the facts Dr. Nobis was negligent in not accepting plaintiffs on board" this is an affirmative statement of doubt in the mind of the Court below (43a).

CONCLUSION

The Judgment of the Court below should be reversed and the factual matters at issue should be submitted to a jury for determination.

Respectfully submitted

Herbert J. Kaplow

HERBERT J. KAPLOW
Attorney for Plaintiffs-Appellants

STATE OF NEW YORK
COUNTY OF NEW YORK

DAVID BARRY being duly sworn deposes and says: On August 8th, 1975 I served the within ~~record on appeal~~ brief ~~appendix~~ on Kaplan Campbell & Keating the attorneys for the appellee ~~respondent~~ by leaving ~~mailing~~ ~~three~~ copies thereof at his office located at 120 Broadway New York, New York 10005

David Barry

Sworn to before me
this 8th day of
August, 1975

Theresa Cobless

THERESA COBLESS
Notary Public, State of New York
No. 4618917
Qualified in Bronx County
Term Expires March 30, 1976